

of title I of ERISA. In discharging their obligations under section 404(a)(1), 29 U.S.C. 1104(a)(1), to act solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to the participants and beneficiaries as well as defraying reasonable expenses of administering the plan, fiduciaries choosing an annuity provider for the purpose of making a benefit distribution must take steps calculated to obtain the safest annuity available, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise. In addition, the fiduciary obligation of prudence, described at section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B), requires, at a minimum, that plan fiduciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. In conducting such a search, a fiduciary must evaluate a number of factors relating to a potential annuity provider's claims paying ability and creditworthiness. Reliance solely on ratings provided by insurance rating services would not be sufficient to meet this requirement. In this regard, the types of factors a fiduciary should consider would include, among other things:

- (1) The quality and diversification of the annuity provider's investment portfolio;
- (2) The size of the insurer relative to the proposed contract;
- (3) The level of the insurer's capital and surplus;
- (4) The lines of business of the annuity provider and other indications of an insurer's exposure to liability;
- (5) The structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts;
- (6) The availability of additional protection through state guaranty associations and the extent of their guarantees. Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a qualified, independent expert. A fiduciary may conclude, after conducting an appropriate search, that more than one annuity provider is able to offer the safest annuity available.

(d) *Costs and Other Considerations.* The Department recognizes that there are situations where it may be in the interest of the participants and beneficiaries to purchase other than the safest available annuity. Such situations may occur where the safest available annuity is only marginally safer, but disproportionately more expensive than competing annuities, and the participants and beneficiaries are likely to bear a significant portion of that increased cost. For example, where the participants in a terminating pension plan are likely to receive, in the form of increased benefits, a substantial share of the cost savings that would result from choosing a competing annuity, it may

be in the interest of the participants to choose the competing annuity. It may also be in the interest of the participants and beneficiaries to choose a competing annuity of the annuity provider offering the safest available annuity is unable to demonstrate the ability to administer the payment of benefits to the participants and beneficiaries. The Department notes, however, that increased cost or other considerations could never justify putting the benefits of annuitized participants and beneficiaries at risk by purchasing an unsafe annuity.

In contrast to the above, a fiduciary's decision to purchase more risky, lower-priced annuities in order to ensure or maximize a reversion of excess assets that will be paid solely to the employer-sponsor in connection with the termination of an over-funded pension plan would violate the fiduciary's duties under ERISA to act solely in the interest of the plan participants and beneficiaries. In such circumstances, the interests of those participants and beneficiaries who will receive annuities lies in receiving the safest annuity available and other participants and beneficiaries have no countervailing interests. The fiduciary in such circumstances must make diligent efforts to assure that the safest available annuity is purchased.

Similarly, a fiduciary may not purchase a riskier annuity solely because there are insufficient assets in a defined benefit plan to purchase a safer annuity. The fiduciary may have to condition the purchase of annuities on additional employer contributions sufficient to purchase the safest available annuity.

(e) *Conflicts of Interest.* Special care should be taken in reversion situations where fiduciaries selecting the annuity provider have an interest in the sponsoring employer which might affect their judgment and therefore create the potential for a violation of ERISA § 406(b)(1). As a practical matter, many fiduciaries have this conflict of interest and therefore will need to obtain and follow independent expert advice calculated to identify those insurers with the highest claims-paying ability willing to write the business.

[60 FR 12329, Mar. 6, 1995]

**§ 2509.96-1 Interpretive bulletin relating to participant investment education.**

(a) *Scope.* This interpretive bulletin sets forth the Department of Labor's interpretation of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and 29 CFR 2510.3-21(c) as applied to the provision of investment-related educational information to participants and beneficiaries in participant-directed individual account pension plans (*i.e.*,

pension plans that permit participants and beneficiaries to direct the investment of assets in their individual accounts, including plans that meet the requirements of the Department's regulations at 29 CFR 2550.404c-1).

(b) *General.* Fiduciaries of an employee benefit plan are charged with carrying out their duties prudently and solely in the interest of participants and beneficiaries of the plan, and are subject to personal liability to, among other things, make good any losses to the plan resulting from a breach of their fiduciary duties. ERISA sections 403, 404 and 409, 29 U.S.C. 1103, 1104, and 1109. Section 404(c) of ERISA provides a limited exception to these rules for a pension plan that permits a participant or beneficiary to exercise control over the assets in his or her individual account. The Department of Labor's regulation, at 29 CFR 2550.404c-1, describes the kinds of plans to which section 404(c) applies, the circumstances under which a participant or beneficiary will be considered to have exercised independent control over the assets in his or her account, and the consequences of a participant's or beneficiary's exercise of such control.<sup>1</sup>

With both an increase in the number of participant-directed individual account plans and the number of investment options available to participants and beneficiaries under such plans, there has been an increasing recognition of the importance of providing participants and beneficiaries, whose investment decisions will directly affect their income at retirement, with information designed to assist them in making investment and retirement-related decisions appropriate to their particular situations. Concerns have been raised, however, that the provision of such information may in some situations be viewed as rendering "investment advice for a fee or other compensation," within the meaning of ERISA section 3(21)(A)(ii), thereby giving rise to fiduciary status and potential liability under ERISA for investment decisions of plan participants and beneficiaries.

<sup>1</sup>The section 404(c) regulation conditions relief from fiduciary liability on, among other things, the participant or beneficiary being provided or having the opportunity to obtain sufficient investment information regarding the investment alternatives available under the plan in order to make informed investment decisions. Compliance with this condition, however, does not require that participants and beneficiaries be offered or provided either investment advice or investment education, *e.g.* regarding general investment principles and strategies, to assist them in making investment decisions. 29 CFR 2550.404c-1(c)(4).

In response to these concerns, the Department of Labor is clarifying herein the applicability of ERISA section 3(21)(A)(ii) and 29 CFR 2510.3-21(c) to the provision of investment-related educational information to participants and beneficiaries in participant directed individual account plans.<sup>2</sup> In providing this clarification, the Department does not address the "fee or other compensation, direct or indirect," which is a necessary element of fiduciary status under ERISA section 3(21)(A)(ii).<sup>3</sup>

(c) *Investment Advice.* Under ERISA section 3(21)(A)(ii), a person is considered a fiduciary with respect to an employee benefit plan to the extent that person "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority to do so \* \* \*." The Department issued a regulation, at 29 CFR 2510.3-21(c), describing the circumstances under which a person will be considered to be rendering "investment advice" within the meaning of section 3(21)(A)(ii). Because section 3(21)(A)(ii) applies to advice with respect to "any moneys or other property" of a plan and 29 CFR 2510.3-21(c) is intended to clarify the application of that section, it is the view of the Department of Labor that the criteria set forth in the regulation apply to determine whether a person renders "investment advice" to a pension plan participant or beneficiary who is permitted to direct the investment of assets in his or her individual account.

Applying 29 CFR 2510.3-21(c) in the context of providing investment-related information

<sup>2</sup>Issues relating to the circumstances under which information provided to participants and beneficiaries may affect a participant's or beneficiary's ability to exercise independent control over the assets in his or her account for purposes of relief from fiduciary liability under ERISA section 404(c) are beyond the scope of this interpretive bulletin. Accordingly, no inferences should be drawn regarding such issues. See 29 CFR 2550.404c-1(c)(2). It is the view of the Department, however, that the provision of investment-related information and material to participants and beneficiaries in accordance with paragraph (d) of this interpretive bulletin will not, in and of itself, affect the availability of relief under section 404(c).

<sup>3</sup>The Department has expressed the view that, for purposes of section 3(21)(A)(ii), such fees or other compensation need not come from the plan and should be deemed to include all fees or other compensation incident to the transaction in which the investment advice has been or will be rendered. See A.O. 83-60A (Nov. 21, 1983); *Reich v. McManus*, 883 F. Supp. 1144 (N.D. Ill. 1995).

to participants and beneficiaries of participant-directed individual account pension plans, a person will be considered to be rendering "investment advice," within the meaning of ERISA section 3(21)(A)(ii), to a participant or beneficiary only if: (i) the person renders advice to the participant or beneficiary as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2510.3-21(c)(1)(i)); and (ii) the person, either directly or indirectly, (A) has discretionary authority or control with respect to purchasing or selling securities or other property for the participant or beneficiary (2510.3-21(c)(1)(ii)(A)), or (B) renders the advice on a regular basis to the participant or beneficiary, pursuant to a mutual agreement, arrangement or understanding (written or otherwise) with the participant or beneficiary that the advice will serve as a primary basis for the participant's or beneficiary's investment decisions with respect to plan assets and that such person will render individualized advice based on the particular needs of the participant or beneficiary (2510.3-21(c)(1)(ii)(B)).<sup>4</sup>

Whether the provision of particular investment-related information or materials to a participant or beneficiary constitutes the rendering of "investment advice," within the meaning of 29 CFR 2510.3-21(c)(1), generally can be determined only by reference to the facts and circumstances of the particular case with respect to the individual plan participant or beneficiary. To facilitate such determinations, however, the Department of Labor has identified, in paragraph (d), below, examples of investment-related information and materials which if provided to plan participants and beneficiaries would not, in the view of the Department, result in the rendering of "investment advice" under ERISA section 3(21)(A)(ii) and 29 CFR 2510.3-21(c).

(d) *Investment Education.* For purposes of ERISA section 3(21)(A)(ii) and 29 CFR 2510.3-21(c), the Department of Labor has determined that the furnishing of the following categories of information and materials to a participant or beneficiary in a participant-directed individual account pension plan will not constitute the rendering of "investment advice," irrespective of who provides the information (e.g., plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (e.g., on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of

information and materials is furnished alone or in combination with other identified categories of information and materials.

(1) *Plan Information.* (i) Information and materials that inform a participant or beneficiary about the benefits of plan participation, the benefits of increasing plan contributions, the impact of preretirement withdrawals on retirement income, the terms of the plan, or the operation of the plan; or

(ii) information such as that described in 29 CFR 2550.404c-1(b)(2)(i) on investment alternatives under the plan (e.g., descriptions of investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses).<sup>5</sup>

The information and materials described above relate to the plan and plan participation, without reference to the appropriateness of any individual investment option for a particular participant or beneficiary under the plan. The information, therefore, does not contain either "advice" or "recommendations" within the meaning of 29 CFR 2510.3-21(c)(1)(i). Accordingly, the furnishing of such information would not constitute the rendering of "investment advice" for purposes of section 3(21)(A)(ii) of ERISA.

(2) *General Financial and Investment Information.* Information and materials that inform a participant or beneficiary about: (i) General financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment; (ii) historic differences in rates of return between different asset classes (e.g., equities, bonds, or cash) based on standard market indices; (iii) effects of inflation; (iv) estimating future retirement income needs; (v) determining investment time horizons; and (vi) assessing risk tolerance.

The information and materials described above are general financial and investment information that have no direct relationship to investment alternatives available to participants and beneficiaries under a plan or to individual participants or beneficiaries. The furnishing of such information, therefore, would not constitute rendering "advice" or making "recommendations" to a participant or beneficiary within the meaning of 29 CFR 2510.3-21(c)(1)(i). Accordingly, the furnishing of such information would not constitute the rendering of "investment advice" for purposes of section 3(21)(A)(ii) of ERISA.

(3) *Asset Allocation Models.* Information and materials (e.g., pie charts, graphs, or case studies) that provide a participant or beneficiary with models, available to all plan

<sup>4</sup>This IB does not address the application of 29 CFR 2510.3-21(c) to communications with fiduciaries of participant-directed individual account pension plan plans.

<sup>5</sup>Descriptions of investment alternatives under the plan may include information relating to the generic asset class (e.g., equities, bonds, or cash) of the investment alternatives. 29 CFR 2550.404c-1 (b)(2)(i)(B)(I)(ii).

participants and beneficiaries, of asset allocation portfolios of hypothetical individuals with different time horizons and risk profiles, where: (i) Such models are based on generally accepted investments theories that take into account the historic returns of different asset classes (*e.g.*, equities, bonds, or cash) over defined periods of time; (ii) all material facts and assumptions on which such models are based (*e.g.*, retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) accompany the models; (iii) to the extent that an asset allocation model identifies any specific investment alternative available under the plan, the model is accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan and identifying where information on those investment alternatives may be obtained; and (iv) the asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual situations, participants or beneficiaries should consider their other assets, income, and investments (*e.g.*, equity in a home, IRA investments, savings accounts, and interests in other qualified and non-qualified plans) in addition to their interests in the plan.

Because the information and materials described above would enable a participant or beneficiary to assess the relevance of an asset allocation model to his or her individual situation, the furnishing of such information would not constitute a “recommendation” within the meaning of 29 CFR 2510.3-21(c)(1)(i) and, accordingly, would not constitute “investment advice” for purposes of section 3(21)(A)(ii) of ERISA. This result would not, in the view of the Department, be affected by the fact that a plan offers only one investment alternative in a particular asset class identified in an asset allocation model.

(4) *Interactive Investment Materials.* Questionnaires, worksheets, software, and similar materials which provide a participant or beneficiary the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income, where: (i) Such materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (*e.g.*, equities, bonds, or cash) over defined periods of time; (ii) there is an objective correlation between the asset allocations generated by the materials and the information and data supplied by the participant or beneficiary; (iii) all material facts and assumptions (*e.g.*, retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) which may affect a participant’s or bene-

ficiary’s assessment of the different asset allocations accompany the materials or are specified by the participant or beneficiary; (iv) to the extent that an asset allocation generated by the materials identifies any specific investment alternative available under the plan, the asset allocation is accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan and identifying where information on those investment alternatives may be obtained; and (v) the materials either take into account or are accompanied by a statement indicating that, in applying particular asset allocations to their individual situations, participants or beneficiaries should consider their other assets, income, and investments (*e.g.*, equity in a home, IRA investments, savings accounts, and interests in other qualified and non-qualified plans) in addition to their interests in the plan.

The information provided through the use of the above-described materials enables participants and beneficiaries independently to design and assess multiple asset allocation models, but otherwise these materials do not differ from asset allocation models based on hypothetical assumptions. Such information would not constitute a “recommendation” within the meaning of 29 CFR 2510.3-21(c)(1)(i) and, accordingly, would not constitute “investment advice” for purposes of section 3(21)(A)(ii) of ERISA.

The Department notes that the information and materials described in subparagraphs (1)–(4) above merely represent examples of the type of information and materials which may be furnished to participants and beneficiaries without such information and materials constituting “investment advice.” In this regard, the Department recognizes that there may be many other examples of information, materials, and educational services which, if furnished to participants and beneficiaries, would not constitute “investment advice.” Accordingly, no inferences should be drawn from subparagraphs (1)–(4), above, with respect to whether the furnishing of any information, materials or educational services not described therein may constitute “investment advice.” Determinations as to whether the provision of any information, materials or educational services not described herein constitutes the rendering of “investment advice” must be made by reference to the criteria set forth in 29 CFR 2510.3-21(c)(1).

(e) *Selection and Monitoring of Educators and Advisors.* As with any designation of a service provider to a plan, the designation of a person(s) to provide investment educational services or investment advice to plan participants and beneficiaries is an exercise of discretionary authority or control with respect to management of the plan; therefore, persons making the designation must act

prudently and solely in the interest of the plan participants and beneficiaries, both in making the designation(s) and in continuing such designation(s). See ERISA sections 3(21)(A)(i) and 404(a), 29 U.S.C. 1002 (21)(A)(i) and 1104(a). In addition, the designation of an investment advisor to serve as a fiduciary may give rise to co-fiduciary liability if the person making and continuing such designation in doing so fails to act prudently and solely in the interest of plan participants and beneficiaries; or knowingly participates in, conceals or fails to make reasonable efforts to correct a known breach by the investment advisor. See ERISA section 405(a), 29 U.S.C. 1105(a). The Department notes, however, that, in the context of an ERISA section 404(c) plan, neither the designation of a person to provide education nor the designation of a fiduciary to provide investment advice to participants and beneficiaries would, in itself, give rise to fiduciary liability for loss, or with respect to any breach of part 4 of title I of ERISA, that is the direct and necessary result of a participant's or beneficiary's exercise of independent control. 29 CFR 2550.404c-1(d). The Department also notes that a plan sponsor or fiduciary would have no fiduciary responsibility or liability with respect to the actions of a third party selected by a participant or beneficiary to provide education or investment advice where the plan sponsor or fiduciary neither selects nor endorses the educator or advisor, nor otherwise makes arrangements with the educator or advisor to provide such services.

[61 FR 29588, June 11, 1996]

#### § 2509.99-1 Interpretive Bulletin Relating to Payroll Deduction IRAs.

(a) *Scope.* This interpretive bulletin sets forth the Department of Labor's (the Department's) interpretation of section 3(2)(A) of the Employee Retirement Income Security Act of 1974, as amended, (ERISA) and 29 CFR 2510.3-2(d), as applied to payroll deduction programs established by employers<sup>1</sup> for the purpose of enabling employees to make voluntary contributions to individual retirement accounts or individual retirement annuities (IRAs) described in section 408(a) or (b) or section 408A of the Internal Revenue Code (the Code).

(b) *General.* It has been the Department's long-held view that an em-

ployer who simply provides employees with the opportunity for making contributions to an IRA through payroll deductions does not thereby establish a "pension plan" within the meaning of section 3 (2) (A) of ERISA. In this regard, 29 CFR 2510.3-2 (d) sets forth a safe harbor under which IRAs will not be considered to be pension plans when the conditions of the regulation are satisfied. Thus, an employer may, with few constraints, provide to its employees an opportunity for saving for retirement, under terms and conditions similar to those of certain other optional payroll deduction programs, such as for automatic savings deposits or purchases of United States savings bonds, without thereby creating a pension plan under Title I of ERISA. The guidance provided herein is intended to clarify the application of the IRA safe harbor set forth at 29 CFR 2510.3-2 (d) and, thereby, facilitate the establishment of payroll deduction IRAs.

(c) *Employee Communications.* (1) It is the Department's view that, so long as an employer maintains neutrality with respect to an IRA sponsor in its communications with its employees, the employer will not be considered to "endorse" an IRA payroll deduction program for purposes of 29 CFR 2510.3-2(d).<sup>2</sup> An employer may encourage its

<sup>2</sup>The Department has specifically stated, in its Advisory Opinions, that an employer may demonstrate its neutrality with respect to an IRA sponsor in a variety of ways, including (but not limited to) by ensuring that any materials distributed to employees in connection with an IRA payroll deduction program clearly and prominently state, in language reasonably calculated to be understood by the average employee, that the IRA payroll deduction program is completely voluntary; that the employer does not endorse or recommend either the sponsor or the funding media; that other IRA funding media are available to employees outside the payroll deduction program; that an IRA may not be appropriate for all individuals; and that the tax consequences of contributing to an IRA through the payroll deduction program are generally the same as the consequences of contributing to an IRA outside the program. The employer would not be considered neutral, in the Department's view, to the extent that the materials distributed to employees identified the funding medium as

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<sup>1</sup>The views expressed in this Interpretive Bulletin with respect to payroll deduction programs of employers are also generally applicable to dues checkoff programs of employee organizations.